7 Takeaways for Employers as Connecticut Passes Recreational Marijuana Bill

Insights
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The Connecticut Senate just voted to approve a bill legalizing recreational cannabis use, and since Governor Ned Lamont has stated he will sign the bill, Connecticut will soon become the nineteenth state to legalize adult-use cannabis. The June 17 vote will also have implications for employers doing business in Connecticut, so you will want to familiarize yourself with the new law sooner rather than later. What are the seven main takeaways for employers?

Background

Beginning July 1, adults 21 and older may possess up to 1.5 ounces of marijuana, or up to five ounces of marijuana if kept in a locked container at home or in a locked glove box or a trunk of a car, without fear of criminal prosecution. Moreover, the sale of recreational marijuana at retail establishments will soon take place, ensuring the wide proliferation of cannabis in the state. The nearly 300-page bill passed last week does not specify when exactly recreational marijuana will begin being sold in Connecticut, but Governor Lamont has previously targeted **May 2022** to launch the retail market.

7 Main Impacts on Connecticut Employers

The bill, also known as S.B. 201, contains specific provisions affecting employers and employees. Specifically, the bill provides for the following seven main changes to the law that employers will need to know about, effective July 1, 2022:

1. Employers do not have to allow employees to perform work duties under the influence of cannabis or permit employees to possess or use cannabis while performing work duties or on the work premises. However, you may need to provide some leeway if the cannabis is "palliative" for qualifying medical marijuana patients, balancing the need for such use with your need to ensure workplace safety.
2. Employers may not take adverse action against any employee because the employee does or does not smoke, vape, or otherwise use cannabis products outside of the workplace, **unless** the employer acts pursuant to an express policy.
3. Employers who implement policies prohibiting employee possession or use of cannabis must ensure the policy is: (1) in writing in either physical or electronic form; and (2) is made available

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clear the policy is: (1) in writing in either physical or electronic form; and (2) is made available to each employee prior to the enactment of the policy and to all prospective employees when offers or conditional offers of employment are made.

4. Even if you have implemented a policy prohibiting employee cannabis use or possession, you may not terminate or take adverse action against an employee or prospective employee for cannabis use or lack of use before the individual was employed by your organization. However, there is a long list of exceptions to this rule:
   - if failure to do so would render you in violation of a federal contract or cause you to lose federal funding;
   - you are permitted to terminate or take adverse action if your primary activity is in mining, utilities, construction, manufacturing, transportation or delivery, educational services, health care or social services, justice, public order, and safety activities, or national security and international affairs; and
   - You are not restricted by this prohibition when it comes to employees or applicants in the following roles: firefighters; emergency medical technicians; police or peace officers; positions requiring operation of a motor vehicle; positions requiring completion of a course in construction safety and health approved by the Occupational Safety and Health Administration; positions requiring a Department of Defense or Department of Energy national security clearance; positions for which the prohibition is in conflict with a collective bargaining agreement or employment contract; positions for which the prohibition is inconsistent or otherwise in conflict with federal law; positions funded wholly or partially by a federal grant; positions requiring the care of children, medical patients, or vulnerable persons; positions with the potential to adversely impact the health or safety of employees or members of the public, in the determination of the employer; and positions at a nonprofit organization, the primary purpose of which is to discourage use of cannabis products or any other drug by the general public.
5. Employers are not prohibited from taking appropriate action upon: (1) reasonable suspicion that an employee used cannabis while performing work duties or on call; or (2) determining that an employee "manifests specific, articulable symptoms of drug impairment" that affect work performance while working at the workplace or on call. Such symptoms may involve the employee's speech, physical dexterity, agility, coordination, or demeanor; manifest as a disregard for the safety of the employee or others; result in an accident that causes serious damage to equipment or property or injury to individuals; or disrupt production or manufacturing.
6. Employers may implement policies requiring drug testing or fitness-for-duty evaluations for employees and prospective employees. However, you may not discipline, terminate, or refuse to hire an individual because a drug test yields positive results solely for 11-nor-9-carboxy-delta-9-tetrahydracannabinol, a metabolite formed in the body after cannabis is consumed, unless:
   - continuing to employ or employing the individual would put you in violation of a federal contract or cause you to lose federal funding;

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- you reasonably suspect the employee's usage of cannabis was while engaged in work duties; or
- the employee manifests specific, articulable symptoms of drug impairment while working that impact the employee's performance.
- This prohibition also does not apply in certain other scenarios, including where an individual applies to a prospective employer who has entered in to a valid collective bargaining agreement that specifically addresses drug testing, conditions of hiring, or conditions of continued employment for all applicants.

7. Employees and prospective employees may bring a civil action in Connecticut state court within 90 days of a purported violation of any of the above requirements. A prevailing individual may be awarded reinstatement of their previous employment or job offer, back wages, and reasonable attorneys' fees and costs.

Labor Provisions Specific to Cannabis Establishment Employers

In addition to imposing restrictions and requirements for Connecticut employers generally, S.B. 201 also contains provisions specific to employers that are cannabis establishments. Specifically, effective July 1, 2021:

- As a condition of final licensure approval, all provisional cannabis establishment licensees, dispensary facilities, or producers must enter into a "labor peace agreement" with a bona fide labor organization that represents employees in Connecticut with respect to working conditions. A "labor peace agreement" is an agreement in which the cannabis establishment agrees not to lock out employees and the union is prohibited from engaging in picketing, work stoppages, or boycotts against the establishment.
- A project involving construction or renovation of any cannabis facility that costs $5 million or more must be subject to a "project labor agreement" between the contractors and subcontractors of the project and the cannabis establishment. A "project labor agreement" should allow all contractors and subcontractors to compete for contracts and subcontracts on the project regardless of whether they are otherwise parties to collective bargaining agreements, establish uniform terms and conditions for all construction labor employed on the project, guarantee against strikes and lockouts, and set forth mutually binding procedures for resolving labor disputes during the course of the project.

If an arbitrator finds that a cannabis establishment licensee failed to comply with an order issued by the arbitrator to correct a failure to adhere to a labor peace agreement, the Department of Consumer Protection will suspend the establishment's license without further administrative proceedings or formal hearing. The licensee's recourse is to commence a state court action to try to lift the license suspension. While a license is suspended, the licensee may not sell or transport cannabis unless the sale or transfer is associated with a voluntary surrender of license and pursuant to a cannabis disposition plan approved by the state.

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In addition, contractors, subcontractors, or unions may seek to enforce the provisions of a project labor agreement and/or seek penalties of up to $10,000 per day for non-compliance by instituting an action in Connecticut state court.

Next Steps

Given Governor Lamont's expression of support for S.B. 201, we expect this bill to become law imminently. Although many of the provisions affecting workplace policies and practices will not take effect until July 2022, Connecticut employers should familiarize themselves with the requirements of the new law and contact legal counsel if they have any questions about changes necessary to ensure timely and full compliance.

Connecticut employers in the cannabis industry specifically must be prepared to meet the labor and contract requirements set forth in the new law even more quickly, by July 1, 2021. Any cannabis establishments with questions regarding new employment requirements should get in touch with their attorneys immediately.

We will monitor further developments and provide updates as warranted. Make sure you are subscribed to the Fisher Phillips Insight service to ensure you receive the latest news directly to your inbox. For further information, contact your Fisher Phillips attorney or the authors of this Insight.

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